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ABSTRACT

In 2002, the Supreme court upheld an Ohio school choice program designed to help children leave Cleveland's failing public schools. This paper explains the history of the Cleveland program upheld in Zelman v. Simmons-Harris, describing the rules that the Supreme Court established for school choice. It includes examples and strategy to help proponents of school choice craft constitutional school choice programs that opponents cannot effectively challenge. The Supreme Court adopted five basic criteria for a program of true private choice in Zelman: any government must have a secular purpose to survive Establishment Clause challenge; a school choice program must offer only indirect aid to religious schools; benefits of a school choice program must be made available to a broad class of beneficiaries; a program must not be set up in ways that favor religious over secular options; and states must ensure that parents have adequate nonreligious educational options. While school choice rules under the federal Constitution are now fairly clear, many state lawmakers still face uncertainty about whether choice programs will be upheld under their state constitutions. Lawsuits now challenging restrictive state constitutions will signal how other states' constitutional provisions will likely be treated. (SM)

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True Private Choice
A Practical Guide to School Choice after Zelman v. Simmons-Harris

by Marie Gryphon

Executive Summary

Until recently, advocates of school choice faced a formidable legal barrier to providing educational options for families: no one knew for sure what school choice programs were permitted by the U.S. Constitution.

In June 2002 the Supreme Court finally lifted the cloud of constitutional doubt that had hovered over the school choice movement. In *Zelman v. Simmons-Harris* the Court upheld a school choice program that was designed by the Ohio legislature to help children in Cleveland escape from that city's failing public schools. The Court did not merely issue a narrow, fact-specific decision on the Cleveland program; it clarified the rules for determining what kinds of school choice programs are constitutional.

This paper explains the facts and history of the Cleveland program upheld in *Zelman* and provides advocates, lawmakers, and concerned parents with a clear explanation of the rules that the Supreme Court has established for school choice. It includes examples and strategy advice to help proponents of school choice win the next legal battle before it even begins—by crafting an obviously constitutional school choice program that opponents can't effectively challenge.

The Supreme Court adopted five basic criteria for a program of "true private choice" in *Zelman*. First, any government program must have a secular purpose to survive Establishment Clause challenge. Second, a school choice program must offer only indirect aid to religious schools. Third, the benefits of a school choice program must be made available to a broad class of beneficiaries. Fourth, a program must not be set up in a way that favors religious options over secular options. Finally, states must ensure that parents have adequate nonreligious educational options.

While the rules for school choice under the federal Constitution are now fairly clear, many state lawmakers still face uncertainty about whether choice programs will be upheld under their state constitutions. Lawsuits now challenging restrictive state constitutions will signal how other states' constitutional provisions will likely be treated.

Those lawsuits have political as well as legal value. They have exposed the shameful, anti-Catholic history of some state constitutional provisions and have reopened the public debate about whether a state should prohibit programs that offer parents educational choices and do not discriminate on the basis of religion.

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Some people are unwilling to simply stand back and watch as the public education establishment sacrifices another generation of American children to union prerogatives and utopian dreams of government schools that are all things to all people.

Introduction

Throughout the United States, lawmakers, parents, and concerned citizens have bemoaned the increasingly poor quality of elementary and secondary education. American students lag behind their European and Asian peers in math and in other basic subjects.[1] Worse, many schools in inner-city areas have become very dangerous.[2]

In response to those crises, the public education establishment—a coalition of teachers' unions and left-leaning ideologues—has urged Americans to increase funding for public education and be patient while they fix its persistent problems. However, more and more parents, activists, and politicians have become dissatisfied with the status quo and have become advocates of school choice. They are unwilling to simply stand back and watch as the public education establishment sacrifices another generation of American children to union prerogatives and utopian dreams of government schools that are all things to all people.

Until recently, advocates of school choice faced a formidable legal barrier to providing educational options for families: no one knew for sure what school choice programs, if any, were permitted by the U.S. Constitution. There was no rulebook.[3] Any state brave enough to enact a school choice program that included religious schools could expect that program to be immediately challenged in court as an "establishment of religion." Such challenges could result in years of litigation and hundreds of thousands of dollars in legal expenses.[4]

In 2002 the Supreme Court finally lifted the cloud of constitutional doubt that had hovered over the school choice movement. In *Zelman v. Simmons-Harris* the Court upheld a school choice program that was designed by the Ohio legislature to help children in Cleveland escape from that city's failing public schools.[5] The Supreme Court did not merely issue a narrow, fact-specific decision on the Cleveland program; it clarified the rules for determining what kinds of school choice programs are constitutional. The Court has provided a fairly clear set of guidelines for lawmakers and advocates who want to enact school choice in their home states.

As state legislatures convene across the nation this year, advocates of school choice are eager to enact legislation that will free families to make educational choices for their children. This paper explains the facts and history of the Cleveland program upheld in *Zelman* and provides advocates, lawmakers, and concerned parents with a clear explanation of the rules that the Supreme Court has established for school choice. It includes examples and strategy advice to help proponents of school choice win the legal battle over federal constitutional issues before it even begins—by crafting an obviously constitutional school choice program that opponents can't effectively challenge.

This paper also describes various state constitutional barriers to school choice, points out which ones may pose the greatest threats, and provides advice on how they may be effectively challenged. Now that the Supreme Court has decided that school choice is acceptable under the federal Constitution, it should be increasingly difficult for states to maintain less tolerant standards.

Zelman v. Simmons-Harris

Facts and History

The Cleveland City School District, the defendant in *Zelman v. Simmons-Harris*, was universally acknowledged to be among the worst in the United States. Even Justice David Souter, who disagreed with the Court's decision to uphold Cleveland's school choice program, felt compelled to admit, "If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here."[6]

The schools in Cleveland were in such financial and operational disarray that in 1995 a federal judge placed the school district in state receivership, declaring that the

schools were in a "crisis of magnitude."[7] The state auditor then reviewed the school district and announced a "crisis that is perhaps unprecedented in the history of American education."[8] The district had met zero of 18 state performance standards, and only 1 in 10 ninth graders could pass a basic proficiency examination.[9]

The failure of the Cleveland schools became a hot political topic, and the state legislature was spurred to action. It enacted, among other measures, the Pilot Project Scholarship Program.[10] That program was designed to provide scholarship and tutoring assistance to children residing in any district operating under the supervision of a federal court, a condition met only by the Cleveland City School District.[11]

The program allows both private and public schools in adjacent districts to accept scholarship students on a lottery basis.[12] Low-income students get priority if the number of applicants is greater than the number of scholarships, and participating schools agree not to discriminate on the basis of race, religion, or ethnic background.[13]

The program also provides funds for tutoring children who remain in the Cleveland public schools[14] and operates alongside programs providing magnet and charter school options to Cleveland parents.[15]

In 1999 various organizations—including the National Education Association, the American Federation of Teachers, and People United for Separation of Church and State—sued the state of Ohio in federal court, claiming that the Cleveland school choice program violated the Establishment Clause of the First Amendment to the U.S. Constitution. The First Amendment states in relevant part, "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof." That language has restrained state lawmakers as well as Congress since the ratification of the Fourteenth Amendment after the U.S. Civil War.[16]

The federal trial court held that the Cleveland program was unconstitutional, and the program's defenders appealed that decision to the U.S. Court of Appeals for the Sixth Circuit.[17] The court of appeals agreed with the trial court that the Cleveland program violated the Constitution but allowed the program to continue while Ohio appealed the decision to the U.S. Supreme Court.[18] The Supreme Court agreed to hear the case during its 2001–2002 term.[19]

The Decision

The Supreme Court reversed the court of appeals decision and upheld the Cleveland school choice program as constitutional in a five-to-four vote.[20] The Court issued a clearly written decision, written by Chief Justice William H. Rehnquist, that should open the door for future school choice programs around the country.

Although the Court presents its decision as merely a meticulous application of current law, *Zelman* offers a paradigm-shifting analysis of the Constitution's Establishment Clause. The Court looks back through several decades of its own decisions and separates them into two categories. In one category are cases involving programs that directly aid religious organizations or subsidize religious activities, whether on a neutral or a discriminatory basis. In the other category are the challenged programs that offer aid directly to individuals, who then make private choices about where to use the aid.

The Court held that, although the former category of programs should be closely scrutinized for evidence of church-state entanglement and impermissible government "endorsement" of religion, the programs in the second category would be upheld so long as they met a few clear rules demonstrating that they are indeed programs of "true private choice." In the words of the Court:

> The Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine

The Court issued a clearly written decision that should open the door for future school choice programs around the country.

> choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.[21]

Attorney Kenneth Starr, who defended the Cleveland program before the Supreme Court, argues that the decision is a victory for one conception of the Establishment Clause over another. He states that in *Zelman* the Court has chosen "neutrality" rather than "separatism" as its touchstone.[22] Other commentators maintain that the "true private choice" doctrine satisfies both conceptions of the clause, because an aid recipient's private choices "break the circuit" between the state and the religious institution chosen, thus maintaining separation.[23]

In any event, the Court has provided a critical road map for education reformers. The constitutional law pertaining to school choice has never been clearer.

The Anatomy of True Private Choice

The Court adopted five basic requirements for a program of "true private choice" in *Zelman*.

The Court adopted five basic requirements for a program of "true private choice" in *Zelman*. A description of those five requirements follows, but a brief initial explanation of their origin in Supreme Court precedent may be helpful.

All federal Establishment Clause questions are analyzed using a modified version of the "*Lemon* test," an inquiry first developed by the Supreme Court in *Lemon v. Kurtzman*.[24] The *Lemon* test originally asked three things: (1) whether a challenged program had a secular government purpose, (2) whether its primary effect was to advance or inhibit religion, and (3) whether it required excessive government entanglement with religion.[25] If the answer to any of those questions was yes, the challenged program was unconstitutional.

The *Lemon* test was modified in *Agostini v. Felton*, because the Court decided that the "excessive entanglement" inquiry looked to the same evidence as the "primary effect" inquiry.[26] The Court held that "excessive entanglement," giving rise to an appearance of state endorsement of religion, was simply a part of the primary effect question. That holding reduced the modern test to two prongs: purpose and primary effect.[27]

As Justice Sandra Day O'Connor writes in *Zelman*, the Court's "true private choice" analysis explains how to determine the "primary effect" of a government program when the central feature of that program is private choice.[28] What follows are the core requirements of a constitutional school choice program under *Zelman* and some advice based on all of the Court's relevant case law for ensuring that new school choice programs are constitutional.

Secular Public Purpose

First, any government program must have a secular purpose to survive an Establishment Clause challenge. Courts are "reluctant to attribute unconstitutional motives to the States,"[29] and this author is unaware of any case in which a school choice program has been struck down for lack of a secular purpose.

Historically accepted secular purposes include "supporting private higher education generally, as an economic alternative to a wholly public system,"[30] defraying "the cost of educational expenses incurred by parents—regardless of the type of schools their children attend,"[31] and, in the case of the Ohio program challenged in *Zelman*, "providing educational assistance to poor children in a demonstrably failing public school system."[32]

Although demonstrating a secular purpose is not difficult, lawmakers should be sure to include a statement of legislative purpose in the enacting legislation to minimize the risk of confusion on this point.[33] Advocates of school choice should also coordinate their messages to ensure that their clear secular purpose is evident in legislative hearings and correspondence. Failure to do

so may at worst induce a lawsuit when none might otherwise be filed and may at best produce needless, time-consuming research and argument.[34]

Aid Must Go to Parents, Not Schools

To qualify as a "true private choice" program under *Zelman*, a program must offer only indirect aid to religious schools.[35] That means that aid must be directed to a private citizen first, not paid directly to a school. The Ohio program challenged in *Zelman*, for example, makes checks out to parents of scholarship students, who then endorse the checks over to the schools they choose.[36]

The rationale for favoring programs that provide aid first to individuals (rather than directly to sectarian institutions) under the Establishment Clause is at least threefold. First, a program dispensing aid to individual recipients empowers a recipient to make a personal, philosophical choice to attend a religious institution without actually turning over any public subsidy to it.[37] Second, if individuals are allowed to direct state aid themselves, the government can avoid any appearance that it is endorsing religion.[38] Finally, since individual fee-for-service bargains are struck between individual aid recipients and schools, it is less likely that the program is merely a sub-rosa effort to subsidize religious sects.[39]

The distinction between direct and indirect aid has been constitutionally significant at least since the Supreme Court decided *Everson v. Board of Education* in 1946.[40] Upholding a bus fare reimbursement program applicable to both public and private school students against an Establishment Clause challenge, the Court noted, "The State contributes no money to the schools" and "does no more than provide a general program to help parents."[41] The Court similarly pointed out in *Board of Education v. Allen* that a state program providing free textbooks to all public and private school students aided families, not religious schools.[42]

Later, in *Committee for Public Education & Religious Liberty v. Nyquist* (1973), the Court downplayed this distinction. In that case, the Court considered a challenge to three separate programs. Two of those programs provided indirect aid to parents rather than direct aid to sectarian schools: a tax deduction for private school tuition and a reimbursement program for low-income private school families. The *Nyquist* Court, which found that all three programs were unconstitutional, acknowledged the relevance of the direct-indirect distinction but attempted to minimize its importance: "[T]he fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered."[43]

However, three subsequent cases upholding choice programs, *Mueller v. Allen*, *Witters v. Washington*, and *Zobrest v. Catalina Foothills School District*, each placed great weight on the distinction between aid provided directly to sectarian schools and aid that reaches those schools only after being first sent to private parties. Those three cases upheld (1) educational tax credits that could be used for tuition at religious schools, (2) college scholarships that could be used to study for the ministry, and (3) provision of a sign language interpreter who could follow a child to a religious private school.[44]

Those cases, along with *Zelman*, demonstrate that the indirect nature of aid to sectarian schools—routed first through parents—is a necessary ingredient of a program of "true private choice." School choice programs must always direct aid first to parents if they wish to be considered under the *Zelman* legal standard.[45] Tax credits, tuition reimbursement programs, and vouchers are all examples of such indirect aid.

A Broad Class of Beneficiaries

In addition, "true private choice" programs must make benefits available to a broad class of beneficiaries.[46] Generally, the broader the group benefited by a particular program, the less likely the program is to be an "establishment of religion." That is because programs with large and heterogeneous sets of participants are unlikely to be controlled by a rela-

School choice programs must always direct aid first to parents if they wish to be considered under the *Zelman* legal standard.

tively narrow religious faction.

Classes of beneficiaries upheld by the Court include "any parent of a school-age child who resides in the Cleveland City School District,"[47] "any child qualifying as 'handicapped' under the IDEA,"[48] and "handicapped students when their studies are likely to lead to employment."[49]

Unsurprisingly, the programs most clearly prohibited are those that distinguish between persons on the basis of religion or the religious nature of the institutions they attend. For instance, a voucher program intended exclusively for Catholic schools would be unconstitutional.[50] That type of blatant religious discrimination is seldom if ever tried. Another example of a school choice program that would be unconstitutional would be one specifically for students whose religious beliefs precluded them from attending local public schools.

The Cleveland program upheld in *Zelman* offered a "choice among options public and private, secular and religious."

Less obvious—but very important for lawmakers or advocates planning a school choice program—is that the Court may prohibit a choice program that exclusively benefits families choosing private schools.[51] That rule originated in the *Nyquist* case.[53] There, opponents of school choice challenged three programs, including tax deductions for private school tuition and reimbursements for low-income families paying private school tuition. The Court held the program unconstitutional, while reserving judgment as to future cases involving aid "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[53]

By contrast, tax credits for educational expenses were upheld in *Mueller* because "all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools" could claim them.[54] Similarly, the Court upheld a college tuition grant program for disabled students in Washington State because the program was "made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature" of the chosen school.[55]

Most recently, the Court appears to have reaffirmed the constitutional relevance of public school participation in *Zelman*.[56] The *Zelman* Court described at length a school choice program that provided private school scholarships as well as tutorial grants to students who chose to remain in their local public schools.[57] The Court then expressly distinguished *Nyquist* because the unconstitutional New York program "gave a package of benefits exclusively to private schools and the parents of private school enrollees."[58] The Cleveland program upheld in *Zelman* offered a "choice among options public and private, secular and religious."[59]

The Court's rationale for requiring school choice programs to involve parents who keep their children in public schools is not clear. Proponents of school choice might reasonably assume that, as long as a program includes both secular and religious private schools, it should be constitutional. After all, what does the public-private distinction really have to do with religion?

The Court apparently believes that a program benefiting only private schools advances religion significantly more than a program that includes both public and private schools. In any event, exclusion of public school students is probably the only thing that still distinguishes *Nyquist* from subsequent cases upholding school choice programs. Since the Court has declined to overrule *Nyquist*, it is possible that no school choice program will be immune from attack unless it offers parents of children in both public schools and public schools some opportunity to participate.

Institute for Justice attorney Clint Bolick disagrees. He argues that *Agostini v. Felton* has eliminated the program-specific public school participation requirement of earlier cases, even though *Agostini* is not a school choice case.[60] With luck he will be proven right. If advocates of school choice do find themselves in the position of defending an all-private program, they should argue that a public school participation requirement for choice programs is contrary to the general

thrust of *Zelman*, which, after all, considers nonprogram options when determining whether parents have adequate secular educational alternatives.[61]

Assuming that a public school participation requirement does still exist, it shouldn't be difficult to meet if lawmakers are careful. For example, when the Arizona legislature enacted a tax credit for donations to private school tuition organizations,[62] it also enacted a tax credit for donations to public schools for the support of extracurricular activities.[63]

Alternatively, a program might give part or all of each child's state-level education allotment directly to parents in the form of vouchers that the parents could sign over to either a public or a private school. That would meet the requirement that public school students be included as program beneficiaries without actually adding to present public school expenditures.

Structural Neutrality toward Religion

In addition to making both secular and religious alternatives available, a program of "true private choice" must not be set up in a way that favors religious over secular options. The choices offered can't be rigged.

A school choice program must not, in the words of the *Nyquist* Court, offer "an incentive to parents to send their children to sectarian schools."[64] One obvious example of an impermissible monetary incentive would be paying extra tuition dollars to sectarian schools. Other impermissible incentives may be nonmonetary in nature. For instance, a program intentionally structured around the existing organization of the local parochial schools—say, using their enrollment forms or operating on their calendar—might artificially encourage their disproportionate participation. That would be constitutionally suspect.

Opponents of school choice argued in *Zelman* that the Cleveland program was improperly "skewed towards religion" because the dollar value of the voucher offered was so low—less than $3,000. Opponents of the program maintained, and dissenting Justice Souter agreed, that the low amount of the voucher restricted participation to parochial schools, because only those schools had the financial resources to supplement the low voucher amount for their scholarship students.[65]

Fortunately, the *Zelman* Court found that argument unpersuasive. The Court instead decided that, even if there had been ample evidence that schools in Cleveland must supplement the vouchers with charitable contributions, many secular educational charities exist to serve that purpose.[66] Accordingly, a low voucher amount, by itself, will not undermine the structural neutrality of a school choice program.[67]

One undecided but interesting question is whether the incentives in a school choice program that are skewed *against* religion violate the Constitution's Free Exercise Clause. Recent case law suggests that rules overtly discriminating against religious institutions do violate the Constitution.[68]

It's less clear whether an indirect structural bias like the one in the Cleveland program is constitutional. The *Zelman* Court found that "[t]he program here in fact creates financial disincentives for religious schools, with private schools receiving only half the assistance given to community [charter] schools and one-third the assistance given to magnet schools."[69] The system disadvantages private religious schools, in part because only nonreligious private schools have the option of converting to charter schools in order to double their per pupil state funding.[70] Two nonreligious private schools serving 15 percent of Cleveland's scholarship students have taken advantage of that opportunity.[71]

The *Zelman* Court did not address the issue of whether a disparate funding structure amounts to a violation of the Free Exercise rights of religious families because no party raised the question. Advocates of school choice should be very cautious when deciding whether or not to make a claim like that. If the political will does not exist in a state to provide true funding parity for religious schools, the effect of a ruling requiring

Recent case law suggests that rules overtly discriminating against religious institutions do violate the Constitution.

Secular options need not be private schools accepting vouchers or tax credit funds. They can also be "nontraditional" alternatives such as magnet and charter schools.

parity could be the destruction of the choice program altogether.

Adequate Nonreligious Options

The Supreme Court in *Zelman* also required school choice programs to ensure that parents have adequate nonreligious educational options available to them. If parents in a choice program are faced with no reasonable alternative to a religious school, then that program will be unconstitutional.[72] The justices refer to whether the program provides "genuine opportunities for Cleveland parents to select secular options,"[73] the need to take account of all the "reasonable educational choices that may be available,"[74] and whether the available secular options are "adequate substitutes" for religious schools.[75]

The Court's use of qualifying words, such as "genuine" and "reasonable," suggests that not just any secular option will fulfill the Court's requirement. Rather, in the words of Justice O'Connor, the secular options must be "adequate substitutes for religious schools in the eyes of parents," although they "need not be superior to religious schools in every respect."[76]

Secular options need not be private schools accepting vouchers or tax credit funds. They can also be "nontraditional" alternatives such as magnet and charter schools, authorized elsewhere in Ohio law.[77] The Court upheld the Cleveland program in part because it considered Cleveland's public magnet schools and charter community schools adequate secular options, worthy of consideration alongside the handful of secular schools accepting vouchers.

The Court was coy about whether Cleveland's troubled traditional public schools qualify as adequate alternatives. It never actually said they do not, but it usually neglected to list them among the choices available to Cleveland parents. While acknowledging that Cleveland's schools are a miserable failure, the Court refused to rule out the notion that traditional public schools not in crisis could qualify as adequate secular options. The Court has thus signaled that in the future courts should count public schools of average or better quality when deciding whether parents in a given area have reasonable secular alternatives to religious schooling.[78]

Possible State Constitutional Barriers to Choice

History of State Constitutional Provisions

Although the rules for school choice under the federal Constitution are now fairly clear, even permissive, many state lawmakers still face uncertainty about whether choice programs will be upheld under their state constitutions. All but three state constitutions contain provisions that could theoretically restrict school choice.[79] Those provisions generally fall into two categories: so-called compelled-support provisions and Blaine Amendments.

Compelled-support provisions are so named because their language generally protects state residents from being "compelled to support" a church or other religious institution.[80] Those provisions, originally intended to prevent states from requiring residents to attend or tithe to established churches, are present in 29 state constitutions, primarily those of older, eastern states.[81] Opponents of school choice have argued that both vouchers and tax credits violate compelled-support provisions, because such programs divert state revenues to religious schools.

The other common type of state constitutional provision restricting school choice is known as a Blaine Amendment, named for Rep. James G. Blaine from Maine, who served in the U.S. Congress in the late 19th century and ran for president on the Republican ticket in 1884.[82] At that time, America was experiencing a strong wave of anti-immigrant sentiment as a result of burgeoning immigration from nations such as Italy and Spain. Unlike early Americans, who were over-

whelmingly Protestant, the new arrivals were often Roman Catholic.

New immigrants' cultural and religious differences, and perceived pressure on the labor markets, produced a nativist backlash typified by the Know-Nothing Party, which gained control of the Massachusetts legislature in 1854.[83]

Schooling became a flashpoint. American public schools were not secular at that time, but they were "nonsectarian" only in the sense that they accommodated all Protestant beliefs.[84] Indeed, the Protestant King James Bible was read to students daily in most schools.[85] Catholic immigrants objected to the reading of the King James Bible and other Protestant indoctrination in the public schools and, along with Jewish immigrants, led successful efforts in a few places to eliminate those practices.[86] As an alternative, Catholics fought for equal tax-funded support for Catholic schools.

Although the federal government had virtually nothing to do with education at that time, President Ulysses S. Grant strongly condemned those moves in an effort to harness nativist sentiment in the service of his reelection. He declared his intent to "encourage free schools, and resolve that not one dollar, appropriated for their support, shall ever be appropriated to the support of any sectarian schools."[87]

The president found a willing accomplice in Representative Blaine, who in 1875 introduced an amendment to the U.S. Constitution that would have prohibited states from funding sectarian education.[88] The commonly used word "sectarian" was understood as code for Roman Catholic. Indeed, the word Catholic appeared no fewer than 59 times in the debates surrounding Blaine's proposed amendment.[89] Those references were accompanied by 23 specific references to the pope.[90]

Although Blaine's amendment passed easily in the House, it fell four votes short of the supermajority needed in the Senate.[91] Nonetheless, it had a lasting impact on state policies. Galvanized by the federal debate, about three dozen states eventually adopted some form of constitutional prohibition of public funding of "sectarian" schools.[92] Several of those states were required by federal enabling legislation to accept Blaine Amendments to their constitutions as a condition of being admitted to the Union.[93]

Many state Blaine Amendments have language very similar to the following, proposed by Blaine in 1875:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any state for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect.[94]

Opponents of school choice argue that those amendments prohibit both voucher programs, by which aid is directed to families rather than to schools, and tax credit programs, under which money never enters a state's coffers in the first place.

Overcoming State Constitutional Barriers

Although both compelled-support provisions and Blaine Amendments can become barriers to school choice, the legal landscape is not as grim as it may appear. In some states with one or both of those constitutional features, courts have nonetheless interpreted their state constitutions to track closely with the federal First Amendment on church-state issues.[95] Those state courts will tend to follow U.S. Supreme Court precedents, such as *Zelman*, when deciding whether a given school choice program violates any provision of their state constitutions.

Professor Frank Kemerer of the University of North Texas, who recently wrote an extensive survey of state law on this issue, has determined that 19 states would probably uphold a school voucher program that meets federal guidelines, either because they already

Although both compelled-support provisions and Blaine Amendments can become barriers to school choice, the legal landscape is not as grim as it may appear.

Table 1
State Constitutional Orientation toward School Voucher Programs

Permissive Orientation		
Alabama	Arizona	Arkansas
Illinois	Maine	Maryland
Mississippi	Nebraska	New Jersey
New York	N. Carolina	Ohio
Pennsylvania	Rhode Island	S. Carolina
Utah	Vermont	W. Virginia
Wisconsin		
Restrictive Orientation		
Alaska	California	Delaware
Hawaii	Idaho	Kansas
Kentucky	Massachusetts	Michigan
Missouri	N. Dakota	Oklahoma
S. Dakota	Virginia	Washington
Wyoming		
Uncertain Orientation		
Colorado	Connecticut	Florida*
Georgia	Indiana	Louisiana
Minnesota	Montana	Nevada
New Hampshire	New Mexico	Oregon
Tennessee	Texas	

Table reprinted with permission from Frank Kemerer, "The U.S. Supreme Court's Decision in the Cleveland Voucher Case: Where Do We Go from Here?" National Center for the Study of Privatization in Education, New York, 2002, Table 1.
Note: For the purposes of this table, it is assumed that a state voucher program would encompass religious private schools.
*Litigation pending.

Religious organizations cannot be excluded from generally applicable government programs simply because they happen to be religious.

have case law demonstrating this or because they have a "supportive legal climate," as evidenced by constitutional language, related law, or the composition of the judiciary (Table 1).[96] Kemerer found that the law in another 14 states was "uncertain," and only 16 states had constitutions that he described as "restrictive," or hostile to choice, as interpreted by state judges.[97]

In the minority of states that would likely interpret their constitutions to bar school choice programs, lawmakers will face a dual roadblock to education reform. On the one hand, the U.S. Supreme Court has made it increasingly clear that religious organizations cannot be excluded from generally applicable government programs simply because they happen to be religious.[98] Accordingly, a state that adopts a school choice program—but excludes religious schools—will probably violate the federal constitution.[99]

On the other hand, a state with a restrictive constitution cannot craft a school choice program that *includes* religious schools either, because that would violate the state's own constitution.[100] Thus, would-be school reformers in those states may be trapped between a rock and a hard place, unable to enact any form of school choice at all.

To resolve that problem, organizations that favor school choice are launching legal attacks, not simply against state programs that discriminate, but also against the Blaine Amendments themselves. The Institute for Justice has filed a lawsuit in Washington State, asking the court to hold the state's Blaine Amendment unconstitutional.[101] The institute has also intervened on behalf of parents in a case challenging a voucher program in Florida, contending that Florida's Blaine Amendment violates federal guarantees.[102]

Constitutional arguments against state Blaine Amendments are threefold. First, the amendments were enacted with the unlawful purpose of discriminating against Roman Catholics, and thus they violate the First Amendment right to the free exercise of religion. Second, the amendments facially discriminate against religious schooling relative to other forms of schooling, which amounts to "viewpoint discrimination" in violation of the First Amendment's guarantee of free speech. Finally, the amendments draw a distinction on the basis of religion, and because religion is a suspect classification under federal constitutional law, states cannot classify people or institutions on the basis of religion unless there is a "compelling state interest" to do so. Without such a compelling state interest, the amendments violate the Fourteenth Amendment's Equal Protection guarantee.

State lawmakers and advocates of school choice should be aware of potential obstacles to school choice that may lurk in their state constitutions. As the suits in Florida and Washington wend their way through the court system, judicial pronouncements may help resolve those issues for other states that have restrictive state constitutional provisions. A federal court of appeals decision might, for example, hold a Blaine Amendment unconstitutional in a way that would be binding on several states over which the court has jurisdiction. The U.S. Supreme Court could decide a case that would eliminate Blaine Amendments everywhere in the country.

Advocates of school choice in restrictive states should also remember that lawsuits have political as well as legal value. The suits filed by the Institute for Justice have exposed the shameful, anti-Catholic history of many of those provisions and have reopened the public debate about prohibiting neutral programs that offer parents choices about education. Some state constitutions may be amended by state legislatures or through the initiative process as a result of this public debate. The debate may also sway state judges, who are often elected, to interpret state constitutions coextensively with the federal Constitution and uphold school choice programs.[103]

Conclusion

The Supreme Court's decision in *Zelman* has sparked a strong, renewed interest in school choice programs across the nation. All of the excitement is justified. For the first time, reformers have a clear set of rules for crafting constitutional school choice programs. Advocates of school choice and lawmakers across the country should seize this newfound opportunity to provide educational choices for families.

Clint Bolick writes that the *Zelman* decision opens the door for a revolution in American education, after which all families will be empowered to choose their schools: "It now seems entirely permissible for the government to adopt a program in which all education funding is channeled through students—to public and private schools alike. The decision could help usher in an era of child-centered public education reform . . . focusing less on *where* children are being educated and more on *whether* children are being educated."[104]

The Supreme Court has held that school choice is constitutional, but families that need choices will not get them automatically. Lawmakers, advocates of school choice, and parents must work to ensure that states take full advantage of the opportunity to expand educational freedom presented by the Court.

For the first time, reformers have a clear set of rules for crafting constitutional school choice programs.

Notes

1. Paul E. Peterson, "Declining Test Scores Reflect Shortcoming of Nation's Schools," *St. Paul Pioneer Press*, October 29, 2002.

2. National Center for Education Statistics, *Digest of Education Statistics, 2001* (Washington: U.S. Department of Education, 2002), Table 150.

3. Even the Supreme Court has admitted that its rulings about education and religion are remarkably unclear: "We can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

4. A state enacting a program excluding religious schools would need to be equally brave. Discrimination against religious schools in a choice program may result in a lawsuit asserting unconstitutional treatment of those schools. See, for example, *Miller v. Benson*, 68 F. 3d 163 (7th Cir. 1995).

5. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

6. Ibid. at 2485. See also dissenting Justice John Paul Stevens referring to "the disastrous conditions that prevented over 90 percent of the student body from meeting basic proficiency standards." Ibid. at 2484.

7. *Reed v. Rhodes*, 1 F. Supp. 2d 705, No. 1:73 CV 1300 (ND Ohio, Mar. 3, 1995).

8. *Zelman* at 2463 citing Cleveland City School District Performance Audit 2-1, March 1996.

9. *Zelman* at 2463.

10. This program is referred to as the "Cleveland school choice program" and the "Cleveland program" in this paper.

11. Pilot Project Scholarship Program, Ohio Revised Code, Ann., sec. 3313.975.

12. Ibid., sec. 3313.976. Unfortunately, the public schools in adjacent districts have uniformly declined to participate in the program. Thomas Berg et al., "School Vouchers: Settled Questions, Continuing Disputes," Pew Forum on Religion and Public Life, Washington, August 2002, p. 6.

13 Pilot Project Scholarship Program, sec. 3313.975-6.

14. Ibid., sec. 3313.975.

15. Ibid., sec. 3314.01. See also *Zelman* at 2464–65.

16. Justice Clarence Thomas uses his concurrence in *Zelman* to argue that, for historical reasons, the First Amendment's prohibition on religious establishment should not be applied to the states with the same force that it applies to Congress. *Zelman* at 2480–82. While interesting and well reasoned, this view is unlikely to be adopted by the Court in the near future.

17. Ibid. at 2465.

18. Ibid.

19. Ibid.

20. Ibid. at 2473.

21. Ibid.

22. Kenneth Starr, Keynote address at Harvard University's conference on "What Next for School Vouchers?" October 17, 2002.

23. See generally Clint Bolick, "School Choice: Sunshine Replaces the Cloud," *Cato Supreme Court Review* 1 (2002): 149. The Court notes in *Zelman* that, when parents of disabled children in a prior case chose the best learning environment for their child, the "circuit between government and religion was broken." *Zelman* at 2467.

24. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

25. Ibid. at 612.

26. *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997).

27. Ibid.

28. *Zelman* at 2476.

29. *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

30. *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736, 754 (1976).

31. *Mueller* at 395.

32. *Zelman* at 2465.

33. The Court often expresses reluctance to question motives of states, "particularly when a plausible secular purpose for the state's program is discernable on the face of the statute." *Mueller* at 394–95.

34. For instance, although the Court in *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) found that a challenged New York program had a secular purpose, the Court did note that the program arose at a time when sectarian schools faced "increasingly grave fiscal problems." *Zelman* at 2472 quoting *Nyquist* at 795.

35. The *Zelman* Court held that a program is one of "true private choice" if it "provides benefits directly to a wide spectrum of individuals." *Zelman* at 2473. Programs providing aid directly to schools are sometimes constitutional as well. See, for instance, *Agostini* at 234–35. However, such "direct aid" programs do not fall into the constitutionally favored category of "true private choice" programs and will be far more thoroughly scrutinized for evidence of state "endorsement" of religion. See *Zelman* at 2465.

36. Ibid. at 2464.

37. Justice O'Connor, concurring in *Mitchell v. Helms*, 530 U.S. 793, 796–97 (2000), gave three reasons why the distinction between direct and indirect aid was important, despite the plurality's view that the distinction was not useful. On this point, Justice O'Connor has since prevailed. A majority of the justices agreed in *Zelman* that the direct-indirect distinction is essential in determining whether a given program is one of "true private choice."

38. Ibid. at 697.

39. Ibid.

40. *Everson v. Board of Education*, 330 U.S. 1 (1946).

41. Ibid. at 18.

42. "Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." *Board of Education v. Allen*, 392 U.S. 236, 243–44 (1968).

43. *Nyquist* at 781.

44. The *Mueller* Court wrote, "We also agree that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject." *Mueller* at 399. The Court also noted in *Witters* that "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Witters v. Washington*, 474 U.S. 481, 854 (1986). In *Zobrest*, the Court noted that the program at issue "distributes benefits neutrally to any child qualifying as 'handicapped.'" *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 10 (1993).

45. A state may enact safeguards to ensure that aid is spent on a qualifying educational opportunity. For instance, in Cleveland checks are made out to parents but then mailed to the parents' chosen participating school. Parents must go to the school to endorse the checks.

46. A program of true private choice "provides assistance directly to a broad class of citizens." *Zelman* at 2467.

47. Ibid. at 2468.

48. *Zobrest* at 10.

49. *Witters* at 491.

50. Dissenting Justice Souter correctly states in *Zelman* that "the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction." *Zelman* at 2502. A more interesting question is whether a voucher program for only nonreligious schools would be a violation of the Free Exercise Clause. That issue is discussed in the section of this paper about state Blaine Amendments.

51. Joseph P. Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," *Public Policy* 21 (1998), agrees.

52. *Nyquist* at n. 38. Professor Frank Kemerer concurs that, had vouchers and tax credits been redeemable at both public and private schools, the *Nyquist* case would have been decided differently. Frank Kemerer, "The Constitutional Dimension of School Vouchers," *Texas Forum of Civil Liberties and Civil Rights* 3 (1998): 137.

53. *Nyquist* at n. 38.

54. This distinction was regarded as "most [important]" to the Court's finding of constitutionality. *Mueller* at 397.

55. *Witters* at 487.

56. A panel of constitutional scholars notes that the *Zelman* Court "distinguished the earlier program [in *Nyquist*] on the ground that, unlike Ohio's, it was not neutral . . . because it did not itself include any public schools." Berg et al., p. 7.

57. *Zelman* at 2463–65.

58. Ibid. at 2472.

59. Ibid. at 2473.

60. Bolick, p. 156

61. Berg et al., pp. 7–8.

62. Credit for Contributions to School Tuition Organization, Arizona Revised Statutes, sec. 43-1089 (2002).

63. Ibid., sec. 43-1089.01.

64. *Nyquist* at 786.

65. *Zelman* at 2495–96.

66. Ibid. at n. 4.

67. Advocates of school choice often find it frustrating that the very opponents of school choice who fight to keep voucher amounts as low as possible later argue that the voucher amounts are impermissibly low. Justice Souter's dissent in *Zelman* makes both arguments. He argues that the dollar amount of the Cleveland voucher is too high because it directs more than "insubstantial" public monies to religious schools but at the same time is too low to encourage non-church-affiliated schools to compete. *Zelman* at 2496. Thus, to argue with opponents of choice about the amount of aid made available by a particular program is a pointless exercise. Opponents of choice do not believe that any amount of aid should be permitted.

68. See Viteritti, p. 715.

69. *Zelman* at 2471.

70. Ibid.

71. Ibid.

72. Ibid. at 2469.

73. Ibid.

74. Ibid. at 2473.

75. Ibid. at 2477.

76. Ibid.

77. Ibid. at 2470–71.

78. See Berg et al., pp. 6–8.

79. Bolick, p. 168.

80. For example, the Pennsylvania Constitution provides in relevant part, "No man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." Pennsylvania Constitution, Art. 1, Sec. 3.

81. Richard D. Komer, "Answers to Frequently Asked Questions about State Constitutions' Religion Clauses," Institute for Justice, Washington, 2002, pp. 2–3.

82. Kemerer, "The Constitutional Dimension of School Vouchers."

83. The Massachusetts Know Nothing Party drafted one of the first state laws prohibiting aid to sectarian schools and simultaneously instituted a Nunnery Investigating Committee. Viteritti, p. 669.

84. "The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers." Viteritti, p. 666.

85. Ibid., p. 667.

86. Ibid., pp. 667–68.

87. Quoted in Steven K. Green, "The Blaine Amendment Reconsidered," *American Journal of Legal History* 36 (1992): 47.

88. Toby J. Heytens, "Note: School Choice and State Constitutions," *Virginia Law Review* 86 (2000): 132.

89. Ibid., p. 138.

90. Ibid.

91. Viteritti, p. 672.

92. Bolick, p. 168.

93. Viteritti, p. 673.

94. Quoted in Heytens, p. 132.

95. For example, although Ohio's high court warns that the state's constitution is not necessarily "coextensive" with the federal constitution, in practice it uses the federal *Lemon* test and accompanying U.S. Supreme Court law to decide religious establishment questions. See *Simmons-Harris v. Goff*, 86 Ohio S. Ct. 3d 1, 10 (1999).

96. See Frank Kemerer, "State Constitutions and School Vouchers," *West's Education Law Reporter* 120 (2002): 38–40.

97. Frank Kemerer, "The U.S. Supreme Court's Decision in the Cleveland Voucher Case: Where Do We Go from Here?" National Center for the study of Privatization in Education, New York, 2002, does not include the state of Iowa.

98. "It is unlikely that the Supreme Court, under the standard of neutrality it has adopted, would permit the States to exclude religious schools or their pupils from participating in programs that distribute public benefits on a general basis." Viteritti, p. 715.

99. Lower federal courts are already weighing in on this question. See, for example, *Davey v. Locke*,

299 F. 3d. 748 (9th Cir. 2002).

100. See, for example, *Witters v. State of Washington Comm'n for the Blind*, 112 Wn. 2d 363 (1989) cert. denied 493 U.S. 850 (1989).

101. *Harrison v. Gregoire*, No. 02-2-01831-3, Thurston County Sup. Ct., Wash. Filed September 24, 2002. See also Ellen Sorokin, "Families Challenge Maine over Tuitioning Exclusion," *Washington Times*, September 23, 2002; and George Will, "School Choice: The Ugly Opposition," *Washington Post*, November 12, 2002.

102. Mary Leonard, "Proponents of Vouchers See Opening," *Boston Globe*, November 18, 2002.

103. "Perceptions to the contrary, the judicial process is significantly political. This is especially true at the state level where thirty-eight states use elections to choose or retain judges." Kemerer, "The Constitutional Dimension of School Vouchers."

104. Bolick, p. 167.

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